Public Prosecutor v Mya Than

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–128 OF 2007
ABDUL ALIM ABDULLAH J
26 MARCH 2011

Criminal Procedure — Plea of guilty — Accused insane — Plea of insanity by accused — Accused certified as schizophrenic — Elements of crime — Whether fulfilled — Whether accused had required actus reus — Whether accused had mens rea during commission of offence — Whether accused fit to plead in court — Penal Code s 84

The principal and alternative charge preferred against the accused was for the offence of murder under ss 302 and 304 of the Penal Code ('the Code'), respectively. When the case came up for trial, counsel for the accused informed the court that she had reservations about the mental condition of the accused which she recognised while interviewing him. Satisfied that there was reason to detain the accused under s 342 of the Code for an observation of one month at Tanjung Rambutan Mental Hospital, the court postponed the trial. The case was later fixed for trial when the court was finally informed that a medical report ('exh D14') concerning the accused was ready. Exhibit D14 revealed that the accused suffered from schizophrenia and that at the time of the commission of the offence, the accused was of unsound mind and did not know the acts and consequences of his actions. Exhibit D14 was submitted and received as evidence before the court. Although the learned deputy public prosecutor ('DPP') did not contest to exh D14, the DPP argued that the accused was fit to plead at the time of the trial and he pleaded guilty to the alternative charge.

Held, acquitting the accused:

(1) The accused had committed the actus reus of killing the deceased but by reason that he was, at the time of the commission of the offence, of unsound mind, he was acquitted and ordered to be kept in safe custody in a mental hospital (see para 7).

(2) The prosecution was certainly cognisant of s 343(3) of the Criminal Procedure Code when he did not contest the accused's fitness to plead on the day of the trial. That section provided that the medical report would be receivable as evidence and which had confirmed the unsoundness of mind of the accused at the time of the commission of the offence. Hence too the medical condition of the accused who was fit to plead at the time of trial and which the court was inherently satisfied with (see para 10).

(3) Exhibit D14 was only raised by the defence. The court did not at all on

its own volition, conduct an inquiry whether he was legally insane at the time of the commission of the offence. Neither the prosecution not the court could raise the issue of insanity during a trial if the accused had not himself raise that defence (see para 11).

(4) Section 84 of the Code fortifies the position of an accused person to raise a defence of insanity when he could establish that he was of unsound mind at the time of commission of the offence. Legal insanity under s 84 of the Code is then for the court to decide but it is not for medical witnesses to determine however distinguished they might be. The defence of insanity having successfully raised, the court was then guided by the provision of s 347 of the Code which recorded an acquittal order and by virtue of s 348 of the Code, further ordered the accused be held at a mental hospital (see paras 12–13).

[Bahasa Malaysia summary

Tuduhan utama dan alternatif yang dikenakan terhadap tertuduh adalah untuk kesalahan membunuh masing-masing di bawah ss 302 dan 304 Kanun Kesekasaan ('Kanun'). Apabila kes tersebut dibicarakan, peguam tertuduh memberitahu mahkamah yang dia sangsi tentang keadaan mental tertuduh yang dikenalpastinya semasa menemuramahnya. Berpuas hati bahawa terdapat alasan untuk menahan tertuduh di bawah s 342 Kanun untuk pemerhatian selama satu bulan di Hospital Mental Tanjung Rambutan, mahkamah menangguhkan perbicaraan. Kes kemudiannya ditetapkan untuk perbicaraan apabila mahkamah akhirnya diberitahu yang laporan perubatan ('lampiran D14') berkaitan tertuduh telah siap. Lampiran D14 menunjukkan bahawa tertuduh mengidap penyakit skizofrenia dan pada masa melakukan kesalahan tersebut, tertuduh tak sempurna akal dan tidak mengetahui tindakan dan akibat tingkah lakunya. Lampiran D14 dikemukakan dan diterima sebagai keterangan di hadapan mahkamah. Walaupun timbalan pendakwa raya yang bijaksana ('TPP') tidak mempertikaikan lampiran D14, TPP berhujah bahawa tertuduh adalah sihat untuk memplid pada masa perbicaraan dan dia mengaku bersalah kepada tuduhan alternatif.

Diputuskan, membebaskan tertuduh:

(1) Tertuduh telah melakukan actus reus pembunuhan tetapi atas alasan yang dia pada masa melakukan kesalahan, adalah tak sempurna akal, dia dibebaskan dan diperintahkan diletakkan dalam jagaan selamat di hospital mental (lihat perenggan 7).

(2) Pihak pendakwaan jelas mengetahui tentang s 343(3) Kanun Tatacara Jenayah apabila mereka tidak mempertikaikan kesihatan tertuduh untuk memplid pada hari perbicaraan tersebut. Seksyen tersebut memperuntukkan bahawa laporan perubatan akan diterima sebagai keterangan dan yang mana telah mengesahkan ketaksempurnaan akal

tertuduh pada masa melakukan kesalahan tersebut. Maka, keadaan perubatan tertuduh yang boleh memplid pada masa perbicaraan dan yang mana mahkamah memang berpuas hati dengannya (lihat perenggan 10).

(3) Lampiran D14 hanya dibangkitkan oleh pembelaan. Mahkamah tidak langsung atas kerelaannya, menjalankan siasatan sama ada dia sah tidak siuman pada masa melakukan pembunuhan tersebut. Pihak pendakwaan dan juga mahkamah tidak boleh membangkitkan isu tidak siuman semasa perbicaraan jika tertuduh sendiri tidak membangkitkan pembelaan tersebut (lihat perenggan 11).

(4) Seksyen 84 Kanun memperkuatkan kedudukan tertuduh untuk membangkitkan pembelaan tidak siuman apabila dia dapat membuktikan yang dia adalah tak sempurna akal pada masa melakukan kesalahan tersebut. Hilang akal dari segi undang-undang di bawah s 84 Kanun adalah untuk mahkamah menentukan tetapi ia bukan untuk saksi perubatan menentukan bagaimana mungkin ia berbeza. Pembelaan hilang akal dibangkitkan dengan berjaya, mahkamah kemudiannya dibantu oleh peruntukan s 347 Kanun yang merekodkan perintah pembebasan dan berikutan s 348 Kanun, mengarahkan selanjutnya tertuduh ditahan di hospital mental (lihat perenggan 12–13).]

Notes

For cases on accused insane, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2830–2831.

Cases referred to

PP v Ismail bin Ibrahim [1998] 3 MLJ 243; [1998] 2 CLJ 213, HC (distd)
PP v Misbah bin Saat [1997] 3 MLJ 495; [1998] 1 CLJ 759, HC (folld)
PP v Nageswari [1994] 3 MLJ 463, HC (distd)
PP v Zainal Abidin bin Mohd Zaid [1993] 1 CLJ 147, HC (folld)

Legislation referred to

Criminal Procedure Code ss 173, 173(b), 178(2), 294, 343, 343(3), 347, 348
Penal Code ss 84, 294, 302, 304, 304(a) 342, 420

Mohd Feizal Mohd Azmi (Alfred Egin with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Jagdish Kaur (AS Jag & Co) for the accused.

Abdul Alim Abdullah J:

[1] The accused is a Myanmar national.

[2] The principal and alternative charges preferred upon the accused read as

follows:

Principal Charge

> Bahawa kamu pada 23 Mei 2007 jam lebih kurang 12.10 pagi di rumah No. 46, Jalan RP 4/11, Taman Rawang Perdana 1, Rawang dalam Daerah Gombak, dalam Negeri Selangor Darul Ehsan, telah melakukan kesalahan membunuh dengan dengan niat iaitu menyebabkan kematian ke atas MANIMARAN A/L SEKARAN, KP 850331-14-6575 dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302, Kanun Keseksaan.

Alternative Charge

> Bahawa kamu pada 23/05/2007 jam lebih kurang 12.10 pagi di hadapan Rumah No. 46, Jalan RP 4/11, Taman Rawang Perdana 1, Rawang dalam Daerah Gombak, dalam Negeri Selangor Darul Ehsan, telah menyebabkan kematian MANIMARAN A/L SEKARAN No. KP: 850331-14-6575 dengan niat menyebabkan kecederaan tubuh badan yang mungkin menyebabkan kematiannya, dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah seksyen 304 (a), Kanun Keseksaan.

[3] This case came up for trial on 23 July 2010. On that day counsel for the accused informed the court that she had reservations about his mental condition which was recognised during her interview of him. Counsel suspected him to be of unsound mind and incapable of making his defence. The court then was satisfied and found reason to detain the accused under s 342 of the Penal Code for a period of one month for observation at the Mental Hospital, Tanjung Rambutan and for it to submit a medical report thereafter. The court postponed the trial.

[4] The court was finally informed on 8 November 2010 that a medical report of the accused was ready. The case was fixed for trial on 10 November 2010.

[5] The medical report revealed that the accused had suffered a mental illness which it named as schizophrenia and that at the time of the commission of the offence the accused was of unsound mind and did not know the acts and consequences of his actions. The accused was however certified fit to plead in court.

[6] The accused who was represented by his counsel pleaded guilty to the alternative charge under s 304(a) of the Penal Code. The facts (exh P4) were read and all other exhs P5–P13 were tendered and admitted by the accused. His counsel then submitted the medical report of the accused and it was received in evidence and marked as exh D14.

[7] The court thereupon found that by reason of exh D14, the accused's mens rea was vitiated and by reason of his unsoundness of mind, was incapable of knowing that his act was wrong or contrary to law. The court in the same, found that the accused did commit the act of killing the victim but by reason of unsoundness of mind, the accused was acquitted and that he was ordered to be kept in safe custody at the Mental Hospital and that the order made therein be reported to the ruler of the state.

[8] The learned deputy public prosecutor did not contest exh D14 at all. He had honestly conceded to it in all. That stand he took was sticking out a mile. Hence there was no resistance to the Defence submission or even exh D14.

[9] The following postulations can be had from a close reading and understanding of the legal provisions and the case law.

[10] The deputy public prosecutor was certainly cognisant of s 343(3) of the Criminal Procedure Code ('the Code') when he did not contest the accused's fitness to plead on the day of trial. That section provides that the medical report shall be receivable as evidence and which had confirmed the unsoundness of mind of the accused at the time of the commission of the offence. Hence too the medical condition of the accused who was fit to plead at the time of trial and which the court was inherently satisfied with.

[11] It is to be noted that exh D14 was only raised by the defence. The court did not at all on its own volition conduct an inquiry whether he was legally insane at the time of the commission of the offence. Neither the prosecution nor the court can raise the issue of insanity during a trial if the accused has not himself raised that defence.

[12] Section 84 of the Penal Code fortifies the position of an accused person to raise a defence of insanity when he can establish that he was of unsound mind at the time of commission of the offence. Legal insanity under s 84 of the Penal Code is then for the court to decide but it is not for medical witnesses to determine however distinguished they may be.

[13] The defence of insanity having been successfully raised, the court was then guided by the provision of s 347 of the Code wherein it recorded an acquittal order and by virtue of s 348 of the Code had further ordered the accused be held at the Mental Hospital.

[14] The case before the court represents no doubt, as the medical report is unambiguous and yet too, is specific. The court being the sole fact finder, as certainly conceded to by the deputy public prosecutor, can properly consider

and legally accept the admitted facts in support of the insanity defence. The court therefore saw no excuse to inquire into the matter and insist on formal evidence being led.

[15] Undoubtedly the issue of insanity has to be dealt with by the court when it is raised as a defence or when the accused has to be determined whether he is fit to plead to stand trial. It is also true that if the accused is fit to stand trial, he may even elect not to raise the issue of insanity for obvious reasons. And the court, neither the prosecution is duty bound to determine or raise the issue.

[16] In a situation where (like in the instant case) and upon the defence of insanity being raised under s 84 of the Penal Code, the court must therefore be satisfied as to the legal insanity of the accused. It is not for medical witnesses to decide upon it. The onus is on the accused to satisfy the court on a balance of probabilities and that can be met by medical evidence of the prosecution or the defence.

[17] The Penal Code and the Code do not preclude an accused who intends to plead guilty to a charge when he is fit to do so at the trial. This is so because unsoundness of mind at the time of the offence is different to that when the accused is certified fit to plead at the time of the trial, which latter condition has been certified by the Medical Superintendent and whose report (exh D14) is also receivable in evidence under s 343 of the Code. That very medical report of the medical superintendent which had been conceded to by the prosecution unreservedly as the record of proceedings would clearly show, placed the court in no position to call into question the plea by the accused at the time of trial. What the court ought to ascertain itself next is whether it is satisfied that the accused has successfully discharged the burden placed upon him in raising the defence of insanity under s 84 of the Penal Code. The court was so satisfied and there was nothing at all that could fluster its finding, warranting formal evidence (in a full trial) being led instead. To put it simply, the court was satisfied that the accused was fit to plead which he did after the charge was read and as the accused was fit to plead, he could perfectly then rely on the defence of insanity, that is, he was incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law.

[18] There is a near absence of authorities on the issue before the court. However two illustrative decisions in *Pendakwa Raya v Zainal Abidin bin Mohd Zaid* [1993] 1 CLJ 147 and *Public Prosecutor v Misbah bin Saat* [1997] 3 MLJ 495; [1998] 1 CLJ 759, the former a decision by Mahadev Shankar J (as he then was) and the latter a decision by Visu Sinnadurai J (as he then was), show conformity to reason and logical thought that the court finds comfort to follow and be guided by. Much of the reasoning and principles of law pronounced or ventilated in the judgments have been followed analogously above.

[19] Two other authorities at variance are *Public Prosecutor v Ismail bin Ibrahim* [1998] 2 CLJ 213, a decision by Augustine Paul JC (as he then was) and *Public Prosecutor v Nageswari* [1994] 3 MLJ 463, a decision by Abdul Malik Ishak JC (as he then was). A

[20] *Public Prosecutor v Ismail bin Ibrahim* was a case heard in revision by the High Court. The accused who was certified fit to plead by the medical superintendent had pleaded guilty to the amended charge and was *convicted and sentenced* by the magistrate to a day's imprisonment and with a fine of RM1,500 in default two months imprisonment. The High Court whilst recognising the provisions of s 84 of the Penal Code and s 347 of the Code was also cognisant of the accused's right to plead guilty and the court's overriding duty to decide upon its satisfaction that the accused understands the nature and consequences of his plea (s 173(b) of the Code). The High Court on the other hand however decided that a guilty plea of the accused must not be accepted and instead a plea of not guilty be entered as an accused who has insanity available to him as a defence is not at liberty to enter a plea of guilty and the court has a duty to inquire on the issue on its own. The High Court in revision reasoned that the magistrate should have entered a plea of not guilty because the accused cannot be found guilty and be *convicted* as he was of unsound mind at the time of the alleged offence and also that he would not be liable to any *punishment*. The High Court thereupon quashed the *conviction* and *sentence* imposed by the magistrate and ordered that a plea of not guilty be entered and the trial be proceeded with. The High Court also directed that if the accused should refuse to raise the plea of insanity as a defence, the magistrate was to conduct an inquiry into that issue in the course of the trial. B C D E F

[21] *Public Prosecutor v Nageswari* was also a case heard in revision by the High Court. The accused had pleaded guilty to an offence under s 420 of the Penal Code. The magistrate had *convicted* the accused and *only thereafter upon his mitigation on the grounds of insanity*, ordered her to be bound over in the sum of RM1,500 for two years under s 294 of the Code. The High Court held that the accused should have been acquitted by the trial court on the ground of mental disorder under s 347 of the CPC, but that to be only so ordered after a full-fledged trial. The High Court then remitted the case to the magistrate for trial with a direction that it be conducted in accordance with ss 347–348 of the Code. G H

[22] Some common features can be discerned or even appreciated from *Ismail bin Ibrahim and Nageswari*. Firstly, the issue of insanity can only be determined in a full trial and the court is duty bound to require all available evidence before it and that an order of acquittal cannot be made after a plea of guilty. Secondly, a successful plea of insanity ought not be accepted by the court but that it must enter a plea of not guilty, and on its own, conduct an inquiry I

on the issue. Thirdly, therefore, the finding of *conviction* was wrong in law and so too was the *sentence* as the accused ought not be liable to any punishment.

[23] Distinguishing *Ismail Ibrahim and Nageswari* with the instant case which finds support in *Zainal Abidin Mohd Zaid* and *Misbah bin Saat*, it would follow that the following undisguised conclusions be desired at:

(a) the accused, though he was of unsound mind at the time of the commission of the offence, was fit to plead at the trial (s 178(2) of the Code). This was certified by the medical report which evidence was before the court (exh D14). The medical report is receivable in evidence (s 343(3) of the Code);

(b) the accused's right to plead guilty was his turf and the court found that it was plain and unequivocal and nothing was found to the contrary warranting the court to inquire into it. The plea was genuine. With that, the court which has an overriding duty had decided to accept the plea of guilty to the alternative charge under s 304(a) of the Penal Code;

(c) there was absolutely no challenge by the prosecution which had acceded to exh D14 unreservedly;

(d) the burden imposed on the accused is to raise the defence of insanity under s 84 of the Penal Code which onus is on the balance of probabilities. It is for the court to decide. It is a legal test and not a medical test;

(e) the defence of insanity having been raised by the accused and by virtue of exh D14 and which is not disputed at all by the prosecution when tendered, had established legal insanity for the purposes of s 84 of the Penal Code; and

(f) consequently, pursuant to s 347 of the Code, the court made a finding that the accused committed the act of killing the deceased but by reason that he was of unsound mind at the time of the commission of the offence, the accused was acquitted of the offence with which he was charged. Further too under s 348 of the Code the court had ordered the accused to be kept in safe custody at the Mental Hospital at the pleasure of the ruler of the state. At all material times the accused was made conversant of the proceedings as he was well represented by counsel.

[24] In both *Ismail bin Ibrahim* and *Nageswari* the High Court, in revision found it repugnant for the trial court to have *convicted* and *sentenced* the accused persons who were certified fit to plead but were of unsound mind at the time of the commission of the offence. In the instant case before the court, I am of the considered view that to say a plea of insanity can only be determined only in a full trial would be over exacting and hypercritical of the unchallenged

medical report which by no means could readily form the basis of a finding by the court hence satisfying the legal test of insanity (s 84 of the Penal Code) and for that reason a finding of an acquittal under s 347 of the Code.

[25] There appears to be no known express provision in the Penal Code or in the Code as to the procedure to be undertaken in a situation where the accused as in the instant case is precluded from pleading guilty. And where with the court is satisfied of the defence of insanity so volunteered and so held out by the accused by virtue of exh D14 and so too conceded affirmatively by the prosecution, that situation could only place the court in no obligation to conduct a full trial when it is satisfied that that burden placed upon the accused has been discharged satisfactorily under s 84 of the Penal Code and consequently the making of the ensuing orders under ss 347 and 348 of the Code.

[26] Where the recording of the plea of guilty is not an irregularity which the court so holds (as the accused has been certified fit to plead), therefore upon the successful discharge by him on a balance of probability of the defence of insanity, the court cannot possibly perceive or even contemplate any irregularity that can occasion any failure of justice thereat.

[27] The court hence found that the accused had committed the actus reus of killing the deceased but by reason that he was at the time of the commission of the offence of unsound mind, the court acquitted him and further ordered him to be kept in safe custody in a Mental Hospital at the pleasure of the ruler of the state.

Accused acquitted.

Reported by Afiq Mohamad Noor